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OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

This brief is respectfully presented by a number of experienced California attorneys who concentrate their practice in the fields of eminent domain and land use regulation primarily (but by no means exclusively) representing private property owners. *Amici* are more fully identified in Appendix B to this brief. All are presently involved in cases squarely presenting issues and questions raised in the instant case. In many of these cases, *Agins v. Tiburon*[1] has been urged as dispositive.

[1](1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 104.

SUMMARY OF ARGUMENT

A. Focus On Questions Of Policy And Equity.

This brief will not extensively address the particular facts of the present case, but will rather focus on significant policy and equity questions presented by the challenged opinion of the California Supreme Court.

It is respectfully, and most vigorously, submitted that the Supreme Court of California has construed the just compensation clause of the Fifth Amendment (binding against states and local governments under the selective incorporation doctrine through the Fourteenth Amendment) in a manner that not only creates a substantial specific injustice in this case, but also divests that clause of any real protective quality and renders it a nullity in California in land regulation situations.

B. Abdication Of Obligation To Enforce Constitutional Right.

The majority opinion evidences a philosophic regression, not of mere years or decades, but back to the days of divine right of sovereign power of the 17th and 18th centuries. In its zeal to protect planners and regulators, the court has restricted the property owner to invalidation, which is represented as a remedy, but is in fact (in all but a few special situations) a non-remedy with no curative potential whatsoever.

The California Supreme Court fell into multiple error in the opinion. The brief will focus on two distinct concepts expressly set forth therein. They are:

(1) *the court's radical, virtually unprecedented conclusion that under no circumstances is damages an appropriate remedy for excessive land use regulation.* This is set forth at 24 Cal.3d at 269-270 in this language:

> "[A]lthough a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation."

See Argument, Point I, *infra.*

(2) *the court's holding that this exclusive remedy of invalidation is available only in those few extreme cases in which governmental regulatory act results in a virtual destruction of all use and value of property.* This is thus articulated at 24 Cal.3d at 277:

> "[W]e hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property."

See Argument, Point IV, *infra.*

It is recognized that this case presents a number of pleading and procedural questions which may prove dispositive. *Amici* urge, however, that the court address the language here quoted, which has extraordinary potential for precedential mischief.

The constitutional rights to just compensation and due process are of high dignity and are not to be avoided by emasculating redefinition. Both the letter and spirit should

be generously implemented. The economic, social and political costs of failing to do so (some of which are quite subtle) are awesome. See Argument, Point IV, *infra.*

When the two concepts reflected in the language above quoted, are meshed with other concepts which are now invading California decisional law, the resulting mix compounds the problem of California property owners in securing justice in disputes with regulating entities. Of these remaining concepts, fairly comprised in these two primary concepts and equally at odds with logic, fairness and the law of this court, one of the most troublesome is that public use is to be narrowly defined in terms of the expressed intent of the regulator, and limited to situations of formal acquisition, affirmative occupation and physical invasion. This court should reaffirm that the effect on the property owner controls, rather than the incantation of the regulating body, or the nature of the mechanism of impairment. See Argument, Point IV. E., F., *infra.*

C. Decision At Odds With All Authority.

In holding that under no circumstance can an owner of a property interest impaired by oppressive regulation secure damages in inverse condemnation, the California court has propounded a maverick decision, at odds with both the express rulings and the texture of the tradition of this court, as well as virtually all remaining American jurisdictions and, indeed, its own earlier rule of law. See Argument, Point II., *infra.* The decision is also at odds with the great weight of scholarly authority in point, which reflects decades of thoughtful analysis. See Argument, Point V., *infra.*

D. Environmental Protection v. Individual Rights: A False Dilemma.

The supposed dilemma between individual rights in property is a phantom dilemma, presenting a false choice. Society can and should protect both our ecological system and human rights. See Argument, Point III.

E. Fundamental Question Presented: Just Cost Distribution.

The problems that challenged the California courts in *Agins v. Tiburon* have bedeviled courts throughout this nation in recent years, as they have tried to deal with an explosion of new, massive and innovative land use controls and regulations, which have their ultimate source in the awakening of the American people to the necessity of conserving and marshaling our finite resources in the interest of future generations. No party in this action is challenging the soundness of these compelling goals. They deserve to be given full consideration in societal planning, in appropriate balance with social and economic factors. The fundamental question *Agins v. Tiburon* raises is whether the *costs* of these land use and preservation devices (and these costs are substantial, direct and indirect, open and hidden) should be socialized, i.e., distributed fairly through that the benefiting public, or whether they should simply be randomized, i.e., imposed upon individuals who simply happen to own the land in the path of a particular project or scheme. *Amici* respectfully submit that the legal and social consequences of anything less than full and fair cost distribution are ultimately unthinkable.

F. A Suggested Approach.

Amici respectfully offer an integral approach to resolution of land regulation cases which arise at the interface of the police power and the just compensation clause. (Argument, Point IV. F., *infra*) This suggested approach is based on fairness and consideration of reasonable private expectations and public need. A two-step analysis is tendered to sever consideration of the threshhold power to regulate from the question of economic consequences of regulation.

G. Need For Resolution By This Court.

The California Supreme Court has indeed, as the dissenting opinion notes, "abdicate[d its] responsibility to give meaning and substance to constitutional mandate."[2] The problem this opinion creates does not lend itself to political solution, and is within the sole province of this honorable court to remedy. See Argument, Point III. F., *infra.*

ARGUMENT

I

THE INVALIDATION NONREMEDY: RECOURSE LEFT TO PROPERTY OWNERS IS TYPICALLY ILLUSORY, WITHOUT REAL SUBSTANCE.

A. The Need For Flexibility.

1. The Infinite Variety.

Contemporary land use controversies arise in a myriad of fact situations. While the basic conceptual dictates of the just compensation and due process clauses of the

[2]24 Cal.3d at 284.

United States Constitution (and derivative provisions in state Constitutions) are firm, courts have traditionally approached these cases on what might be fairly described as an *ad hoc* basis. There is a sound reason for this; a precedent or maxim that brings poetic justice in one instance often works chaos in the next.

This versatility has reduced predictability, but has had a salutory effect on justice. It should be preserved.[3] Limiting relief to invalidation, as the California Supreme Court here proposes, would unduly shackle courts. It can only disturb the vital and fragile balance between the governors and the governed which is so essential to the health of the body politic, and gestate repeated injustice.

2. The Futility of Invalidation After Damage Done.

Invalidation really only works where a court reviews a regulatory act *prior* to the time the act has adversely impacted private rights in property. Invalidation at that point gives the regulating entity an effective option: it can either abandon the regulatory scheme, or if the ends are of sufficient importance, modify the regulation to provide for fair compensation. If the property owner is awarded appropriate litigation costs and fees, he also emerges whole.

[3]The claim in Appellee's Motion to Dismiss or Affirm that appellants urge that "inverse condemnation is constitutionally the only required remedy for excess land use regulation" (Motion, p. 16) represents such an egregious mischaracterization of appellant's consistent position as to challenge credulity. It is the California Supreme Court which has chosen to constrict and limit the tools available to courts in dealing with oppressive land use regulation, and the City of Tiburon defends this position. It is the property owners who argue for breadth and flexibility to permit courts to tailor remedies to facts to insure substantive justice.

In stark contrast, if a court reviews a regulation *after* it has already had the effect of taking or damaging private rights in property, invalidation is largely beside the point. The damage has been done. The entity has *completed* a violation of the constitutional guarantees, which violation is not cured by the court merely informing the entity of that fact. *Only just compensation can cure the violation.* In this situation, a property owner does *not* "transmute an excessive use of the police power into a lawful taking for which just compensation in eminent domain must be paid." 24 Cal.3d at 273. The *entity* has, through an excessive use of police power, itself created a situation in which impairment is a *fait accompli.*

The remainder of this point will demonstrate why, in the real world of contemporary California land use regulation practice, invalidation is basically a phantom remedy, with no real capacity for relief. Because *Agins v. Tiburon* arose in California and because *amici* are most familiar with California practice, statutes and practices herein discussed will typically be California statutes and practices. This by no means suggests, however, that these are unique to this jurisdiction. Comparable statutes and practices have pervasive distribution throughout the United States.

B. The Finality Problem.

1. The Yo-Yo Game.

A major flaw in restricting relief from unconstitutional regulation to invalidation is that such relief lacks finality in any real sense. The court tells the regulating body of its

excess, at which point the entity typically becomes free to try again.[4]

It works something like this. Assume that, against all odds, a property owner is able to persuade a court to invalidate a regulation. The supposedly defeated entity (or an *amicus* appearing in its support) then advises the court that it cannot simply correct the defective ordinance. All the court can do is send the entire package back to the very entity which caused all the trouble in the first place, for it to therein further exercise its "discretion".

At this point, the parties found find caught up in what is sometimes called the yo-yo game. If a reviewing court, for example, strikes down a regulation which permits one residential unit to be built for each ten acres, the local entity on remand passes a new regulation permitting one unit to be built for each eight acres. If this is also struck down, the entity then enacts an ordinance permitting one

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[4]This is the meaning of this language from former Thousand Oaks' City Attorney, James Longtin, quoted (pp. 28-29) in appellant's Jurisdiction Statement:

> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975)."

To give this invitation to abuse the weight it deserves, it should be noted that Mr. Longtin is no garden variety ex-City Attorney, but is the author of *California Land Use Regulations* (Local Government Publications 1977), a comprehensive (800 pages plus) law and practice book in wide usage in California, particularly in government offices.

unit for every twelve acres, or every six acres, or whatever. The object of the game is to exhaust the property owner's funds, or patience, or both. Attrition inevitably takes its toll, and the regulators, who may have enacted a series of extravagantly unconstitutional regulations and decisively lost every court clash, prevail. It is a game a property owner cannot win. It is a game he should not have to play. It is so cynical and surrealistic that it invariably leaves a distaste for law and institutions of justice.

2. An Invitation To Abuse.

It is no answer that, as the City contends in its Motion to Dismiss or Affirm herein on file (p. 8), "[t]his case does not involve abuse by government agencies in continually adjusting their positions following adverse court decisions against them with the intent of continuing to frustrate an owner in accomplishing any reasonable use of land." The point is that the opinion in *Agins v. Tiburon* is a clear invitation to prospective abuse. When an entity official realizes that the worst thing that can happen when a blatantly unconstitutional regulation is promulgated is that a reviewing court may some time in the future inform it that such regulation is in fact unconstitutional, there is no disincentive to act abusively. In this context, it should be borne in mind that during the period a regulation (valid or otherwise) is in effect, an entity is accomplishing the purpose the regulation was designed to accomplish. A series of invalid regulations, enacted *seriatim,* may bring the full benefit of a valid regulation.

3. "Trust Us".

Challenged by this scenario of the possibility of unchecked abuse, governmental officials sometimes respond that, after all (1) governments are instituted for the benefit of the public; and (2) its representatives are public servants who will, of course, voluntarily and invariably deal fairly with citizens. Without questioning the good faith and bona fides of any public official, experience has repeatedly taught that an ideologue in a position of authority zealously dedicated to the preservation of the environment, or the quality of life, or some other worthwhile end, may lose perspective as to means with unfortunate constitutional consequences to those being regulated.

C. How Do You Invalidate a Course of Conduct?

A practical infirmity in the invalidation remedy lies in the fact that so few of the cases that are litigated involve "pure" regulation. More typically, a case will present a course of entity conduct which may *include* regulation, but typically other factors as well: moratoriums, bond issues, extensive delays, broken promises, demands for unreasonable dedication, repeated false starts, trespass, chilling publicity, acquisitive intent, bad faith, or whatever.[5] *Agins v. Tiburon* is not atypical in this aspect.

Obviously, invalidation is not an adequate remedy in these situations. How do you "invalidate" delay? How do you "invalidate" publicity that renders property unsaleable? How do you "invalidate" bad faith? And what

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[5]It must be remembered that the various acts and events in a course of conduct must be considered cumulatively, and not separately. See *Amen v. City of Dearborn* (E.D. Mich. 1973), 363 F.Supp. 1267, 1277-1278.

if (as is often the case) the course of conduct includes *no* formal regulation subject to invalidation?

D. The Limited Scope.

There is another serious flaw in the invalidation remedy. When California property is subjected to severe regulation that (1) has been drafted and executed according to accepted procedural standards, (2) serves some ostensible public purpose, (3) imposes restrictions bearing some arguable relationship to this purpose, and (4) preserves that minimal utility in the owner (five percent? three percent? one percent?) so that the regulation does not "deprive the landowner of *substantially all* reasonable use of his property"[6] (24 Cal.3d at 277), its owner not only has no adequate remedy, he has *no remedy whatsoever*. See Point IV, *infra*. For a dramatic illustration of how *Agins* made a bad situation worse, compare *Toso v. City of Santa Barbara* (1979), 88 Cal.App.3d 654, 151 Cal. Rptr. 912, with the post-*Agins* opinion in the same case (2 Civ. 49261; Feb. 6, 1980).

E. Even If You Win, You Lose.

Even in the unlikely event the landowner clears all these hurdles and obtains satisfactory substantive relief through invalidation, he will not be made whole,[7] inasmuch as he has been ground through the legal mill with

[6]In weighing each of these factors, every intendment and presumption is typically accorded the regulators; a California court is most reluctant to "substitute its judgment". See, e.g., quote from *Morse v. County of San Luis Obispo* (1967), 247 Cal.App.2d 600, 55 Cal.Rptr. 710, in Footnote 3 of appellee's Motion to Dismiss or Affirm.

[7]The unequivocal constitutional standard (*under both United States and California law*) is that he be made whole. *United States v. Miller* (1943), 317 U.S. 369, 373; *People v. Lynbar, Inc.* (1967), 253 C.A.2d 870, 880, 62 Cal.Rptr. 320; *Los Angeles v. Harper* (1934), 139 C.A. 331, 334, 33 P.2d 1029.

its attendant costs in time, money, and loss of use of property.[8]

In inverse condemnation actions in California, a victorious property owner who has suffered a taking of any interest in real property, is awarded "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred . . ." California Code of Civil Procedure § 1036. The successful invalidator gets no such benefit.

F. The Reluctant Witness.

There is one more powerful, albeit reluctant testimony to the essential worthlessness of the invalidation remedy in California.

If this Court had the leisure to review the entire body of advocacy literature filed in California land use cases in recent years, one very illuminating fact would emerge in bold relief. Attorneys who have appeared to defend the interest of property owners invariably dislike invalidation, and the more experienced and sophisticated they are, the greater is this dislike. The champions of invalidation have been public attorneys *who represent those very entities against whom this remedy is supposed to be efficacious*. This is very much like wolves instructing shepherds on the subject of sheep protection. This is highly revealing, but is in no sense paradoxical. Entity attor-

[8]Representative of an impressive array of cases in which a property owner was visited by foreclosure on the subject property, or actual bankruptcy, during the course of litigation, are *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1978), 566 F.2d 1353; and *Southpark Square Ltd. v. City of Jackson* (5th Cir. 1978), 565 F.2d 338.

neys have huckstered this remedy for the exact reason counsel for property owners have adamantly opposed it. Both know full well that it is a sham.

G. A Comprehensive Guide to California Invalidation Cases.

California is the most populous state in the Union. Its lands are among the most intensely regulated, and its citizens certainly among the most litigious. If invalidation were a satisfactory remedy for abusive use of government regulatory power, it might be anticipated that the main problem in familiarizing oneself with the law would be one of selection, i.e., sorting through and choosing from the abundance of decisions in which land use regulations of California governmental entities have been invalidated on the ground of confiscation.

But, this anticipation would be wide of the mark. If a species of humor which peaked a decade ago were revived, "A Comprehensive Guide to California Invalidation Cases" would qualify for inclusion in the library of the world's shortest books. The last reported cases in California in which threat of confiscation lead to invalidation are *Hamer v. Ross* (1963), 59 Cal.2d 776, 31 Cal. Rptr. 335, 382 P.2d 375, and *Kissinger v. Los Angeles* (1958), 161 Cal.App.2d 454, 327 P.2d 10. For all interests and purposes, California courts ceased to invalidate a decade or more before the Supreme Court of California went public with its ultra-stringent test in *H.F.H. Ltd. v. Superior Court* (1975), 15 Cal.3d 508, 125 Cal.Rptr.

365, 542 P.2d 237, cert. den. 425 U.S. 904,[9] and *Agins v. Tiburon.*[10] See Point IV, *infra.* Since *Hamer v. Ross,* vir-

[9]*H.F.H., Ltd. v. Superior Court* is the spiritual ancestor of *Agins v. City of Tiburon.* During its pendency, *H.F.H., Ltd. v. Superior Court* generated a near avalanche of *amicus* briefs, on both sides, it being widely anticipated that the court's decision would be of consequence. *H.F.H., Ltd. v. Superior Court* is cited repeatedly in both the majority and dissenting opinions in the case at bar. It will also be the subject of frequent reference in this brief.

In contrast to *H.F.H., Ltd. v. Superior Court, Agins* seemed during its pendency to fit well within the ambit of existing law, and prompted very limited *amicus* participation. The use of the decision as the occasion for a major *pronunciamiento* caught the land use bar somewhat unaware. Thus the expanded perception mentioned on p. 6, fn. 6, of appellee's Motion to Dismiss or Affirm. Any expansion of issues (and the expansion, if any, is only of pre-existing issues; the basic issues were raised at the trial level) is traceable to the opinion itself and not to counsel for appellants.

Perhaps the most remarkable thing about the *Agins* opinion is that nothing therein (except the dissent) suggests cognizance of its revolutionary nature, or its inconsistency with the law of other American jurisdictions, the court's own prior announcements, and the bulk of respected scholarly opinion on point.

In *Agins v. Tiburon,* the Supreme Court reversed a Court of Appeal decision not found in the official reporter because of California law under which the Supreme Court opinion totally supersedes the Court of Appeal opinion (California Rules of Court 976, 977), which thereafter may be cited for only limited purposes. The Court of Appeal opinion in this case is reprinted at 145 Cal.Rptr. 476. *Amici* agree with the result of this opinion (which now has no force of law), but not necessarily with all of the reasoning therein.

[10]This posture is atypical for the California Supreme Court. It has an honored history of enlightened and sensitive decisions enlarging individual freedom and expansively interpreting constitutional guarantees against the threat of oppression by the state or some other powerful institution. See, e.g., *Vasquez v. Superior Court* (1971), 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964; *Dillon v. Legg* (1968), 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912. *Holtz v. Superior Court* (1970), 3 Cal.3d 296, 90 Cal.Rptr. 345, 475 P.2d 441, is a very progressive and fair-minded inverse condemnation (physical damage) case (see particularly 3 Cal.3d at 304). *Agins v. Tiburon* is against that tradition. The court here adopts a regressive approach, constricting individual rights and narrowly limiting constitutional guarantees. It does not look forward, but back toward the era when people held liberty, property, and even life, at the whim of the sovereign.

tually a whole generation has passed, and the environmental movement has come of age.

This court should not be misled in its deliberations by citations to invalidation cases from other jurisdiction, notably New York. What happens in these states has no relationship to reality in California. The New York courts really and truly *do* invalidate regulations, and do so with frequency and vigor. Courts in California do not. If past history is any guide, what the California Supreme Court is saying when it articulates that invalidation shall be the exclusive remedy for excessive regulation is that there shall be no remedy at all. The ostensible remedy is a paper tiger, and regulatory entities are given *carte blanche*.[11]

[11]A particularly readable account of this reluctance of California courts to rule against regulating government entities in land use cases, concentrating on one governmental entity, the California Coastal Commission, is found in Berger, *You Can't Win Them All —Or Can You?* 54 Cal. State Bar Journal 16 (1979). This Commission was established by the California Legislature and given sweeping powers (California Public Resources Code §§ 30300, *et seq.*) to fulfill its charge of protecting the precious California coastline from erratic development or exploitation. The need for such protection is clear and some real accomplishment by the Commission (there are really a number of Commissions, one central and several subordinate local bodies) are indisputable: nonetheless, erratic practice and the Commission's dedication to expedited and abbreviated proceedings and noncompensable regulation have generated substantial and growing criticism, including a charge by some of its more vocal critics that it has demonstrated a sensitivity to due process that would have embarassed Genghis Khan. Mr. Berger's thesis, argued with impressive scholarship and trenchant wit, is that neither logic nor equity nor precedent have been permitted to stay or deter California courts in their appointed rounds of validating every regulatory enactment of the Coastal Commission, no matter how oppressive or whimsical.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT IN AGINS V. TIBURON, ABOLISHING THE REMEDY OF MONETARY DAMAGES IN OPPRESSIVE LAND USE REGULATION CASES IS CONTRARY TO FIRMLY ESTABLISHED DECISIONAL PRECEDENT OF THIS COURT AND OF THE REMAINING AMERICAN JURISDICTIONS.

A. Agins Ignores Prior Decisional Law of This Court.

In holding that excessive land use regulation can never, no matter how irrational or oppressive, create a cause of action for damages in inverse condemnation, the California Supreme Court purported to interpret not only the just compensation clause in Art. 1, § 19 of the California Constitution, but also the just compensation clause of the Fifth Amendment of the Constitution of the United States. In this latter aspect, it boldly attempted to overrule firmly established precedent of this court.

The landmark case of *Pennsylvania Coal v. Mahon* (1922), 260 U.S. 393, is the decision most often cited for the principal that the difference between non-compensable regulation and compensable impairment is quantitative and not qualitative, depending upon the substance of the burden visited and not the label appended to the impairing mechanism. The thrust of this language from *Pennsylvania Coal* is clear:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amend-

ment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. . . . *The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*" 260 U.S. at 415. (Emphasis added.)

Justice Holmes further stated that the question of whether a regulation goes too far is "a question of degree —and therefore cannot be disposed of by general propositions." 260 U.S. at 416. The equitable core of the opinion is thus articulated:

> "*We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*" 206 U.S. at 416. (Emphasis added.)

The California Supreme Court shunted *Pennsylvania Coal* aside in *Agins*, asserting that since in *Pennsylvania Coal* no monetary damages flowed to the aggrieved party (none were asked), this court could not have really meant what it said. 24 Cal.3d at 274. This is a most flimsy thread on which to hang a rejection of unequivocal language of a superior tribunal.

But at least *Pennsylvania Coal* was mentioned by the *Agins* majority. Other opinions of this court, consistently holding to the same effect, were not.

Representative of these other case is *United States v. Central Eureka Mining Co.* (1958), 357 U.S. 155, wherein it was stated:

> "We have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking." 357 U.S. at 168.[12]

Even where, on particular facts, a property owner is ultimately unsuccessful, this court has carefully reaffirmed its philosophic commitment to the *Pennsylvania Coal* doctrine, as in *Goldblatt v. Town of Hempstead* (1962), 369 U.S. 590, 594:

> "This is not to say, however, that governmental action on the form of regulation cannot be so onerous as to constitute a taking *which constitutionally requires compensation.*" (Emphasis added.)

In *Agins*, the California Supreme Court thus said precisely what the United States Supreme Court insisted is not to say.

More recent cases, with diverse results, which have reaffirmed the *Pennsylvania Coal*[13] principle are *Penn Central*

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[12]The philosophy underlying *Pennsylvania Coal*, fair distribution of the costs of public improvements among those benefiting thereby, has often been restated by this court.

From *United States v. Willow River Power Company* (1945), 324 U.S. 499, 502:

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

[13]*Pennsylvania Coal* was not the first case of this court to articulate its principle, which has explicity or implicity quickened just compensation decisions virtually since the founding of the Republic. It pervades, for example, *Pumpelloy v. Greenbay and Mississippi Canal Co.* (1872), 13 Wall. 166, 80 U.S. 557.

Transportation Co. v. City of New York (1978), 438 U.S. 104, and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979), 440 U.S. 391.[14]

B. Opinion Without Parallel or Precedent.

Neither the City of Tiburon nor any *amicus* appearing on its behalf invited the attention of the Courts below to a case from the supreme tribunal of any other American jurisdiction holding that the inverse condemnation damages remedy is simply not available in a zoning or other regulation case. This was not due to oversight; to our knowledge, *there exists no such case.*[15] There are cases holding invalidation to be a suitable remedy, and cases in New York and some other jurisdictions holding it to be a preferred (and even strongly preferred) remedy, but no Supreme Court case from any state but California holds invalidation to be an *exclusive* remedy.[16]

Thus, California is at odd not only with the United States Constitution, but also with *all* sister jurisdictions.[17]

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[14]*Lake Country Estates* must be read in conjunction with *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1977), 566 F.2d 1353, a related case which makes clear its consistency with the *Pennsylvania Coal* line.

[15]Some recent cases from other jurisdictions hold damages to be the appropriate remedy. See Jurisdictional Statement, pp. 19-22, and postdating the filing of that Statement) *Estuary Properties v. Askew* (1980) .... Fla. ....

[16]There is at least one case, however, from an intermediate appellate in another state so holding. *Davis v. Pima County* (1978, Ariz. App.), 121 Ariz. 343, 590 P.2d 459, cert. den. (1979), ... U.S. .... [61 L.Ed. 312]. *Davis v. Pima County* relied almost exclusively on *H.F.H., Ltd. v. Superior Court, supra.*

[17]This brief is not a proper vehicle for an extended speculation as to how California got out of touch with the rest of the country. Citizen movements to limit government taxes and expenditures, of which Proposition 13 is only the most famous, obviously played a role. They do not offer the whole answer, since they are predated

(footnote continued next page)

In *Agins v. Tiburon,* the court also repudiated *sub silentio* its own prior rule of law:

> "While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and *its exercise requires compensation." House v. Los Angeles County Flood Control District* (1944) 25 Cal. 2d 384, 389; emphasis added.

In 1975, the Texas Supreme Court stated that "[it] is now *universally recognized* that acts short of actual physical invasion, appropriation or occupation can amount to a compensable taking, and that *government restrictions on the use of property can be so burdensome as to constitute a compensable taking". San Antonio River Authority v. Garrett Brothers* (Tex. 1975), 528 S.W.2d 266, 273; emphasis added. A rule of law *universally* recognized only five years ago is thus no longer recognized in California.

C. The Police Power-Eminent Domain Dichotomy and How It Grew.

1. Introduction.

The issues presented in this case, like the issues in all cases, take on particular clarity when seen in their full historical context. With the court's indulgence, a concise

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by the earliest of the restrictive decisions. Physical isolation imposed by the Sierra Nevadas and Death Valley may be a factor. Of obvious significance is the fact that environmental organizations (which wield great power in California), the Office of the State Attorney General, and public interest and quasi-public interest law firms have repeatedly appeared as *amici* in California courts advocating noncompensable regulation and curtailment of individual rights in property.

summary of that context will here be attempted. This history centers at the interface of the just compensation guarantee in the Fifth Amendment and that attribute of sovereignty called police power.

2. Police Power as Regulator of Morals.

Anglo-American jurisprudence, and the law of this court, have historically recognized two different types of cases involving state interference with property interests of private parties, each presenting its own equitable ramifications. The *first* is the situation where the owner is forced to sacrifice his property for a road, schoolhouse, etc., wherein compensation is obviously appropriate to distribute the cost. The *second* is the situation in which the property owner is engaged in some activity on his property which is harmful or offensive to other citizens in the community. There are clear punitive overtones in the older cases requiring correction without compensation situations which externalize harm beyond the borders of the property. The community was policing the behavior of its citizens, and the power by which it did this became known as the police power.[18]

The police power is still exercised prohibitively in this type of situation:

> "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." 1 Nichols, *The Law of Eminent Domain* (Rev. 3d Ed. 1974) § 1.42.

[18]The California Supreme Court early stated that "[t]he police power of the city refers rather to the regulation of its morals than its property," referring to, among other sources, § 162 of Blackstone's commentaries. *Los Angeles v. Los Angeles City Water Company* (1882), 61 C. 65, 10 P. 491.

Up until the late 19th and early 20th Century, the police power was used coercively only in situations where the proscribed conduct was *malum in se*.[19]

As the police power developed, scholars began to clothe it with conceptual substance, and to explore its relationship with the eminent domain power. A classic formulation, often quoted, is that of Professor Ernst Freund:

> ". . . it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful." Freund, *The Police Power*, § 511 (1904).

Thus, the idea of noncompensability for police power exercise was, when it became engrafted onto the corpus of the law, perceived as an appropriate response to antisocial activity of a public nuisance nature, and grounded in conscious policy. It was perceived as a *very limited exception* to a general rule of compensability for governmental impairment of private rights.

3. Expansion of the Police Power: Malum Prohibitum and Beyond.

The technological revolution, the increase and centralization of population, and the change in political and social consciousness which occurred roughly simultaneously

[19]There is one significant exception to this generalization, the emergency situation such as war exigency, spreading fire or virulent disease. Even then, the property owner was not always left without compensation. See, e.g., *United States v. Russell* (1871), 13 Wall. 623, 627-628, 20 L.Ed. 474; *Sweet v. Rechel* (1895), 159 U.S. 380.

and interdependently modified the relationship between the individual and the state. The pre-existing police power underwent a metamorphosis and began to be used in a broader spectrum of situations. It is beyond the scope of this brief to attempt to precisely chart its evolutionary expansion, but the first logical steps, from the *malum-in-se*-with-fault-implied situation, appear to be situations where the proscribed activity was (1) *malum in se* without connotation of wrongdoing and (2) *malum prohibitum,* i.e., not intrinsically bad but forbidden only because of time, place, and circumstances.[20]

4. Externalized Benefit: The Advent of Modern Land Use.

A major step was taken when the police power began to be used (cautiously at first) in externalized benefit situations, i.e., situations in which the sovereign desired not to stop a noxious activity on the subject property, but rather to insure the continuance or modification of an existing condition because it is beneficial to society.

Zoning, the most prominent type of large-scale land regulation, is of relatively recent origin. California became one of the first states to have zoning legislation, when the California Legislature passed such a law in 1917. A subdivision map act was first passed in 1929. Los Angeles created a series of use zones during the 1904-1915 period, putting it in the absolute vanguard of United

[20]As noted in *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 388:

> "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 272 U.S. at 388.

States cities in that regard. However, Los Angeles had no comprehensive zoning until 1946. San Francisco first adopted a zoning ordinance in 1921. Other municipalities generally followed the lead of the metropolises. See Hagman, Larson & Martin, *California Zoning Practice* (California Continuing Education of the Bar 1969) §§ 1.3, 1.4.

The problem then presented to the courts was whether the holdings of police power cases dealing with nuisance suppression were adaptable to situations with no connotation of wrongdoing, or if new rules would have to be forged.[21] The problem was two-fold, addressing:

(1) government's right to comprehensively regulate, in the absence of wrongful or quasi-wrongful use of land, and

(2) the right of those whose interests were regulated to just compensation.

[21]Attempts to rigidly superimpose the Freund test on modern, non-nuisance cases have resulted in some very curious opinions. A striking example is the thoroughly wrongheaded decision of *Just v. Marinette County* (1972), 56 Wisc. 2d 7, 201 N.W.2d 761. In this case, the court in effect held that the state could regulate, under the Freund rubric, lands adjacent to navigable waters to the point of confiscation because permitting anything to be done on such lands would be *harmful* to the environment, and the regulation thus produced a *useful* result. This inversion approach presents interesting possibilities. For example, while it might appear that a hospital provides a public benefit and therefore *useful,* it could also be asserted that the absence of a hospital is *harmful,* and therefore land can be expropriated for a hospital without compensation. Or, to apply another twist, it could be stated that while the maintenance of a drug outlet adjacent to a high school might be considered *harmful* to the public, actually the absence of such an institution would be *useful* and, therefore, compensation is required if the outlet were forcibly closed. The Freund standard is thus reduced to a puerile semantic game.

5. The Euclid-Pennsylvania Coal Standard.

During the 1920's, in a series of cases of which *Pennsylvania Coal v. Mahon, supra, Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365 are the most famous, this court attempted to reconcile the increasing muscular exercise of police power by public entities with the just compensation clause.

In *Agins,* the California Supreme Court interpreted this court's opinion in *Euclid v. Ambler* to permit ever-increasing noncompensable regulation. 24 Cal.3d at 275. This misreads and misrepresents both the letter and spirit of that case. In the context of the case at bar, it must be consistently and firmly borne in mind that *the legal battleground in Euclid and related cases*[22] *was the power of the entity to regulate in the first instance, not the manner in which the cost of such regulation was to be borne or distributed.*

In *Euclid,* the petitioning party sought "an injunction restraining the enforcement of the [challenged zoning] ordinance." 272 U.S. at 384. Neither the words "just compensation", nor the words "inverse condemnation", nor the words "eminent domain", nor even the word "taking" appear in the decision *at all,* nor do the concepts they embody. The court simply held that the zoning plan "in its general scope and dominant features" was "a valid exercise of authority". 272 U.S. at 397. It cautioned that when the provisions of the comprehensive zoning plan were "concretely applied", some of them, or even many of them, may be

[22]*Zahn v. Board of Public Works* (1927) 274 U.S. 325; *Gorieb v. Fox* (1927) 274 U.S. 603; and *Nectow v. Cambridge* (1928) 277 U.S. 183.

found to be clearly arbitrary and unreasonable". 272 U.S. at 395. *Euclid* is thus, simply, authority for the right of a public entity to regulate in the public interest. It is respectfully urged that *Euclid* is *not* authority for an entity to regulate without the payment of just compensation.

Euclid v. Ambler Realty Co. and *Pennsylvania Coal Co. v. Mahon,* read in tandem, thus create a standard which makes possible aggressive and flexible police power exercise in the public interest, coupled with protection of private rights. An entity has a right to regulate and act vigorously, but a concomitant duty to equitably distribute the burdens generated by its acts.

6. Berman v. Parker.

Between 1928 and recent years, this court has been (at least compared to the 1915-1928 period) relatively dormant in this area, and heard few cases of special significance to the present appeal. *Berman v. Parker* (1954), 348 U.S. 26, however, is of profound importance here, framing in just and definitive terms the relationship of the police power and the just compensation guarantee. In *Berman,* the owners of properties in various states of disrepair in Washington, D.C., sought to enjoin condemnation of those properties under the District of Columbia Redevelopment Act, which authorized elimination of blighted properties dangerous to public health, safety, morals and welfare. About midway in his consideration, Judge William O. Douglas, writing for a unanimous court, stated:

> "We deal, in other words, with what traditionally has been known as *the police power.*" 348 U.S. at 32; emphasis added.

Through the remainder of the opinion, he speaks of the eminent domain power and police power as integrated, and not as separate and mutually exclusive tools, upholds the challenged act, and concludes:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." 348 U.S. at 36.

Thus, this court clearly held once again that an exercise of police power in the public interest may generate the need for just compensation, but is not thereby invalid. *Agins v. City of Tiburon* is not reconcilable to this standard.

7. The Environmental Movement.

It seems that there have always been a few people visible, such as John Muir and Rachel Carson, who have enjoyed special sensitivity to the environment and the ability to communicate this awareness. They used to be called "conservationists"; the term "environmentalist" and the movement it describes matured from humble beginnings in the 1950's and 1960's. Land use practitioners and courts now find themselves dealing regularly with inventive and sometimes grandiose regulatory schemes seeking control and preservation of open space, scenic easements, threatened flora and fauna, and other exotic and esoteric interests, not remotely contemplated a few decades ago. Predictably, the existing body of land use law has once again been thrust into a new situation. It has been a tight

fit, working well in some situations and spawning irrational and confusing results in others.[23]

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[23]This is hardly new. The court need not be reminded that one of the salient characteristics of just compensation law is its startling disorder. Professor Arvo Van Alstyne describes it as "[w]ith some exceptions . . . largely characterized by confusing and incompatible results, often explained in *conclusionary terminology, circular reasoning*, and empty rhetoric." Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So.Cal. L.Rev. 1, 2 (1970). Professor Joseph Sax notes that "the predominant characteristic of this area of law [is] a welter of confusing and apparently incompatible results." Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964). In *Griggs v. Allegheny County in Perspective: 30 Years of Supreme Court Expropriation Law*, 1962 Supreme Court Rev. 63, Professor Allison Dunham labeled the decisions in this area by "the crazy-quilt pattern". In his justly celebrated article, Professor Frank Michelman described the law in this area as "liberally salted with paradox", and points to "jarring outcomes", "surprizing to the uninitiated". Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harvard L.Rev. 1165, 1169-1170 (1967).

Part of this colorful and disturbing jurisprudential history is **obviously traceable to the necessarily *ad hoc*** nature of court review; this each-case-on-its-own facts approach does not make for decisional harmony.

A larger problem, though, has clearly been a widespread misperception as to the essential nature of the police power and the eminent domain power. Instead of being recognized as harmonious and integrated aspects of a single power, the power to govern, they are often treated as two separate powers, each with its own set of component elements, generating widely variant consequences. Decisions based on this compartmentalization in case law are too often *a posteriori*, circuitously describing results without explaining how they were reached.

What too often happens is that if a court decides, after considering all applicable facts and circumstances that a particular taking or damaging was compensable, it affixes an "eminent domain" label. If, on the other hand, the court, after considering all applicable facts and circumstances, decides that the acquiring entity cannot or need not pay compensation, the regulatory act is dropped into the "police power" slot. Stating that a regulation was under the police power has unfortunately become a shorthand way of saying that it is noncompensable, and stating that it was

(footnote continued next page)

8. Penn Central.

This court's most recent extensive consideration of the just compensation clause in land use context, *Penn Central Transportation Co. v. New York* (1978), 438 U.S. 104, is fully explored in other briefs, and will not be here considered in detail. The 6-3 split suggests that the case stimulated a lively internal debate. The majority and the dissenters had little quarrel about the basic controlling principles, but disagreed as to their application to the facts.

In its analysis, the majority reiterated that the controlling standard was (as set forth in *Armstrong v. United States* (1960), 364 U.S. 40, 49) whether government action forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole".

The majority emphasized the importance of the "reasonable expectations of the claimant" in each case.[24]

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pursuant to the power of eminent domain has become a shorthand way of saying that it is compensable.

This has been compounded by the frame of reference in which regulation cases (particularly zoning and master plan cases) sometimes arise. Questions as to the right to constitutional just compensation simply get lost in a morass of municipal law minutia (dealing with notice, public hearings, resolutions and the like) which evolved in a totally different context. A resolution adverse to the property owner may follow based upon the misconception that if the enactment of a regulation was procedurally sound, it cannot raise a compensation issue, a classic instance of the tail wagging the dog.

[24]At 438 U.S. 127, it cited *Pennsylvania Coal* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking' ", and in subsequent analysis, emphasized that the *effect* of the Pennsylvania statute was to make the contemplated use "commercially impracticable".

The majority was impressed that appellants had conceded that (1) the property in its present state was capable of earning a reasonable return; and (2) the transferable development rights they had been awarded by the agency in lieu of granting their development application were valuable rights. 438 U.S. at 129. Of further significance was the fact that income from other properties Penn Central owned was imputable to the terminal which was the subject matter of the action.

No such factors are present here. Appellants pled that the instant property as restricted is *not* capable of generating a reasonable return. They were awarded no right or compensation of any sort to offset the destruction that has been worked.

The majority noted at the end of its opinion (438 U.S. at 138, fn. 36):

> "We *emphasize* that our holding today is on the *present record* which in turn is based on Penn Central's *present ability* to use the Terminal for its intended purposes and in a gainful fashion. *The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have changed such that the terminal ceases to be, in the city's counsel's words, 'economically viable', appellants may obtain relief.*" See Tr. of Oral Arg. 42-43. (Emphasis added.)

The dissenters concurred as to the controlling principles, but not as to their application. From the dissent:

> "Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. The Court has frequently

held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. See, e.g., *United States v. Lynah,* 188 U.S. 445, 470, 23 S.Ct. 349, 357, 47 L.Ed. 539 (1903). But the converse is not true. A taking does not become a non-compensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property." 438 U.S. at 149; emphasis in original.

Penn Central is solidly in the mainstream tradition of this court's land use decisions. It is not reconcilable with the rigid California position enunciated in *Agins v. Tiburon,* and Appellee's analysis (Motion to Dismiss or Affirm, pp. 9-11, 13-14) is flawed insofar as it suggests to the contrary.

III

THE SUPPOSED DILEMMA BETWEEN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS IS A FALSE DILEMMA. SOUND POLICY AND EQUITY MANDATE THAT SOCIETY PROTECT INDIVIDUAL RIGHTS WHICH FALL IN HARM'S WAY WHEN THE POLICE POWER IS EXERCISED IN THE PUBLIC INTEREST.

A. The Spurious Choice.

Those who champion noncompensable regulation urge that society must make a choice in this area, that it cannot both further the interests of the community and protect individual's rights in real property. This is a phantom dilemma, a false choice. The objectives are in no sense mu-

tually exclusive. It is not like a custody battle, or title dispute, where someone must win and someone must lose. Society can act boldly and innovatively in the furtherance of the land use priorities of the day, and at the same time protect individuals from bearing an unjust and disproportionate share of the burden generated by such acts. The question is not one of our *ability* to do this, but rather our *willingness,* and the price to our collective moral conscience if we do not.

If the purpose underlying the project in question is public, government always has the option of acquiring the interest it needs through formal condemnation. *Leo Sheep Co. v. United States* (1979), ...U.S. ..... [99 S.Ct. 1403, 1410].

The remainder of this point will examine some of the philosophic underpinnings of the California court's harsh position and some of the consequences which flow therefrom.

B. The Risk to the Fisc.

The majority dwells at length on the risk of financial chaos it foresees if society were required to justly distribute the economic displacement generated by land regulation. Indeed, this concern seems to be the cardinal consideration underlying the opinion. The spectre of Proposition 13 looms pervasively. The opinion seems to infer that we simply cannot afford to be fair. In fact, we cannot afford not to be fair.

There are a number of ways that financial exposure can be controlled: bond issues, fund diversions from lower

priority programs, incentives to voluntary cooperation (as with charitable contributions), cooperation between governmental levels (the public domain contains millions of acres with no particular environmental significance; the Federal Government could sell some to make funds available to permit acquisition of more sensitive properties), increase in efficiency, deferring or abandoning programs as an alternate to expenditure.[25] All of this is, however, incidental to the central problem of fairly socializing the burden.

C. New Reality or Old Confiscation?

It would be less than candid to fail to acknowledge that there is a political and philosophical aspect to this problem. It is not directly expressed in the opinion below, but abundantly in evidence in the secondary literature which had an impact on this opinion. There is a visible and articulate segment of our intellectual community which argues fervently that "new realities" require that we abandon as anachronistic private property (and often similarly "outdated" institutions and precepts such as the free enterprise system and the work ethic) and move (in the title phrase of the bestselling book by behaviorist B. F. Skinner) "Beyond Freedom and Dignity" (Alfred A. Knopf, 1971) toward some kind of collectivist nirvana. The particulars of this gilded future vary somewhat, depending upon whose

[25]If citizens or their elected representatives fail to make available funding for a particular project close to the enlightened hearts of planners, bureaucrats or local jurists who know best, deference to the expressed will of the people, whether or not soundly based, is appropriate. This is the American tradition. Attempts to override that expression in a manner bringing covert, incremental erosion of constitutional protections should not be tolerated.

blueprint is examined, but all seem to have as center supports (1) the increasing marshaling of our resources into the public sector of the economy, and (2) an enhanced presence of government in many aspects of our lives.

It is not the purpose of this brief to address the substantive merits of these visions, of which noncompensable land regulation is but one component.[26] But it must be noted that these are most significant issues, and any change should come through ballot box expression by the American people, following informed debate. Appropriate modifications in constitutional and statutory language should follow. Changes should not be made *sub silentio* by accretion and indirection, as happened in the opinion in the instant case, which accomplished a *de facto* transfer of rights in property worth literally billions of dollars from the private to the public sector of our economy in this state, with no public debate whatsoever.[27]

A quotation from a California case that has become greatly beloved by regulators and their friends in recent years is the expression in *Metro Realty v. County of El*

[26]A philosophic justification for noncompensable regulations often advanced by those who truly believe therein is that land has no intrinsic value, but only that value which society gives it. Accordingly, it is not unjust for society to take away that which it has given. See Bowden, *Environmental Legislation*, 4 Real Estate Law Journal 165, 174-175 (1975) for a representative articulation of this theory. This, again, is not the place for an extended analysis of this contention, beyond noting that if it is true for realty, it is also true for personalty, money, jobs, positions of power in government and industry, and a myriad of rights and relationships we greatly treasure but which would have no significance but for their (and our) interpersonal and social context. The mere fact that things which are part of our lives derive their basic meaning from social relationships does not mean they are not worthy of protection.

[27]This last sentence may appear to be hyperbole. It is not.

Dorado (1963), 222 Cal.App.2d 508, 518-519, 35 Cal.Rptr. 480, that "some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community."[28] This statement makes sense when its subject is temporary inconvenience or minor adjustments in value shared pervasively throughout a community. But the quotation is cynically inappropriate for situations of random and isolated confiscation of property interests worth hundreds of thousands, or even millions, of dollars. A society engaged in these activities without justly distributing burdens is neither enlightened nor progressive.

D. An Anomaly in the Law.

Consider these three hypothetical cases, each involving the same 10-acre parcel:

(1) Eight acres are subjected to direct condemnation, destroying 80% of the value of the owner's interest;

(2) Flood damage attributable to the public project destroys 80% of the value of the owner's interest; and

(3) The imposition of a regulation destroys 80% of the value of the owner's interest.

The impact on the property owner, and the policy considerations of basic fairness and congruence of benefit and burden, are identical in each situation. The mechanism of impairment is *labeled* differently in each case, but the *substance* of impairment in a constitutional sense remains the same. *Ergo,* the result in each case should be

[28]This was quoted by the California Supreme Court in *H.F.H., Ltd. v. Superior Court, supra,* 15 Cal.3d at 516.

the same. But if *Agins* is not overruled, California Courts will be charged to award damages in the first two situations and not the last. Form triumphs over substance, and label over reality. Logic and equity alike abhor such an anomalous result.

E. Ultimate Impairment.

Particularly difficult is the situation where a regulation removes virtually all use and value, leaving bare title in the property owner. He is then worse off than if he had been the victim of outright confiscation. Confiscation would merely deprive him of his investment in the land. Harsh regulation does that also, but further requires that he retain *ad valorem* tax liability; vulnerability to litigation under dangerous condition, attractive nuisance, and a plethora of other legal theories; and the responsibility to maintain the land consistent with local law. This is ultimate impairment.[29]

F. The Federal Alternative.

A predictable by-product of harsh recent California land use decisions has been an accelerating migration of aggrieved landowners into the federal courts. The increasing exercise of this federal option has brought its own response, which has been a state-wide campaign, apparently orchestrated by the office of the Attorney General (which has appeared as intervenor or *amicus curiae* in virtually every California land use case in the federal courts) to persuade federal judges to abstain from exer-

[29]See *Commissioner of Natural Resources v. Volpe & Co.* (1965), 349 Mass. 104, 206 N.E.2d 666; *Arverne Bay Construction Co. v. Thatcher* (1938), 278 N.Y. 222, 15 N.E.2d 587.

cising their jurisdiction in favor of the State bench, under the rubric that a state matter of considerable significance is involved.[30]

This tactic has met with mixed results. Some courts have abstained; others have not.[31] Abstention gives only temporary relief to the entities; under *England v. Louisiana State Board of Medical Examiners* (1964), 375 U.S. 411 plaintiffs are permitted to return to federal court for adjudication of federal issues at the conclusion of the state proceedings.

Contentions that land use regulation is a local matter best left to state and local tribunals ring hollow when those tribunals refuse to enforce the federal constitution. Should this court forge a firm remedy that California courts will be required to enforce, it is predictable that there will be fewer invocations of federal jurisdiction.

G. The Impotent Political Process.

It has been suggested that uncompensated victims of *de facto* confiscation should seek relief through the political process. This is not realistic.

[30]Under authority of *Railroad Commission of Texas v. Pullman Co.* (1940), 312 U.S. 496.

[31]Only those cases where abstention is ordered have reached the Ninth Circuit. Refusal to abstain does not produce an appealable order. The Ninth Circuit position has been that abstention is discretionary, and abstaining District Courts have been upheld. *Sederquist v. City of Tiburon* (1978), 590 F.2d 278; *Rancho Palos Verdes Corp. v. City of Laguna Beach* (1976), 547 F.2d 1092. The Sederquist property is on Tiburon Ridge, very close to the Agins property. A representative reported District Court case in which a motion for abstention was denied is *Barbaccia v. County of Santa Clara* (N.D. Cal. 1978), 451 F.Supp. 260.

Many governmental abuses can be controlled by the traditional sequence of (1) abuse, (2) public awareness and (3) throwing the rascals out. This pattern will not be effective here, since the expropriated rights and values are not seized for the private enjoyment of the expropriators, but rather become public property. The public is informed that the preservation of valuable land has been secured without cost, or whatever. Seldom do members of the public pause with concern and inquire at what cost, or more precisely, at whose cost, this has been accomplished. Rather than being threatened, the official's position is enhanced.[32]

The courts, for sound reason, have been the traditional guardians of individual rights at odds with public pressure, as for example those speaking or writing unpopular thoughts. The court has recognized that "the ascertainment of compensation is a judicial function". *Davis v. George B. Newton Coal Co.* (1925), 267 U.S. 292, 301. If the courts fail to preserve and protect the fundamental constitutional right of just compensation it will simply not be protected.

An excellent illustration of this principle is readily at hand. In *H.F.H., Ltd. v. Superior Court, supra,* the California Supreme Court, apparently recognizing that injustice could result from the harsh standard the decision formulated (a perception not reflected in *Agins v. City*

[32]This is a lesson that revolutionary leaders around the world have well learned. After taking power, one of the first things they typically do is to nationalize some industry, or seize and distribute wealth belonging to landlords, merchants and other members of the former upper or middle class, and thereby consolidate their power and position.

of Tiburon), suggested that relief could be obtained through recourse to the legislature.[33] 15 Cal.3d at 522. Progress report after five years of attempts to implement that suggestion: virtually nothing has happened.

IV

TO PERMIT A PROPERTY OWNER RELIEF FROM OPPRESSIVE LAND USE REGULATION ONLY WHEN THAT REGULATION DESTROYS SUBSTANTIALLY ALL USE OF THE PROPERTY DOES NOT RISE TO THE LEVEL OF A MEANINGFUL CONSTITUTIONAL PROTECTION.

A. A Constitutional Right Of High Dignity.

An aspect of the *Agins v. Tiburon* opinion that is cause for particular concern, meriting address by this court, is the language in the opinion limiting the protection of the just compensation clause of the Fifth Amendment to those situations where the utility of property is virtually destroyed.

From the outset of this nation's history, individual rights in property have been recognized as being of high worth and dignity. The linkage of life, liberty and property in the due process clause of the Fifth Amendment is no happenstance. The just compensation clause of that same amendment was the first constitutional protection of the Bill of Rights that became binding on the states under the doctrine of selective incorporation.[34]

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[33]The court's statement that the problems "lie beyond our remedial powers" is not soundly based. Just compensation law, beyond the basic constitutional charge, is judicially created and capable of judicial modification.

[34]*Chicago B&Q R.R. Co. v. City of Chicago* (1897), 166 U.S. 226. See dissent in *Walz v. Tax Commission* (1970), 397 U.S. 664, 701-702.

This court has, through the decades, reaffirmed the basic significance of this constitutional protection in a wide variety of contexts.[35] The court has correctly perceived that the rights of life, liberty and property exist in a state of symbosis, each depending on the other.[36] Property is the present residuum of past liberty.

To rebut those who speak disparagingly of "property rights" as something of minimal concern as contrasted to "personal" rights, this court made clear in *Lynch v. Household Finance Co.* (1972), 405 U.S. 538, 542, 552, that property has no rights, and that the rights protected by the just compensation clause are "basic civil rights".

B. Destruction By Reduction.

The constitutional language as interpreted by this court is too clear to permit any American court to simply decide that it chooses to no longer enforce the just compensation

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[35]Indeed, in *Agins*, the California Supreme Court gave lip service to this concept when it stated (24 Cal.3d at 273-274) that rights in property were "equated by the constitutional draftsmen with cherished personal protections" and that it would not ". . . countenance the service of this legitimate need [regulation of the use of private land] through the uncompensated destruction of private property rights." In the remainder of the opinion, the court countenances exactly that, and leaves the impression that the public entity, not the individual citizen, enjoys the constitutional protection.

[36]An oft-quoted exposition of this concept is from the dissent (5-4 split) in *Block v. Hirsch* (1921), 256 U.S. 125, 165, which dealt with rent control in a war emergency situation:

> "The security of property next to personal security against the exertions of government is of the essence of liberty, . . .
>
> "There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush*, 251 U.S. 182, 187, 40 Sup.Ct. 113, 64 L.Ed. 215. Protection to it has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, Burlington, etc., R.R. Co. v. Chicago*, 166 U.S. 226, 17 Sup.Ct. 581, 41 L.Ed. 979."

clause. Rather than engaging in such straightforward rejection, the California court sounded the death knell by indirection. It redefined the just compensation clause in such a way as to make its protection illusory.

A brief reflection upon the language of the opinion (i.e., that there is no protection unless the effect of the regulation "is to deprive the landowner of substantially all reasonable use of his property")[37] makes this clear. Constitutional protections do not work this way. They consist of a pervading spirit and specific language, and both must be served if the protection is to have real force.

Analogies to other protected rights may sharpen perception of the effect of this destruction by reduction. The *Agins* holding is comparable to a ruling that the right of free speech under the First Amendment is intact unless the effect of the challenged restriction is "to deprive the

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[37]Since the limitation in *Agins* and *H.F.H., Ltd. v. Superior Court, supra,* is couched in terms of *use*, it is sometimes argued there is no protection against diminished *value*. The distinction is a *non sequitur*, since "the value of property results from the use to which it is put". *Cleveland C.,C. & St. L.R.R. Co. v. Backus* (1894), 154 U.S. 439, 445; See also *Branson v. Bush* (1919), 251 U.S. 182, 187.

Agins v. Tiburon (24 Cal.3d at 274, 277) refers repeatedly to "mere" diminution of value, suggesting a matter of minimal consequence. There is nothing "mere" about (to use the example from *H.F.H.* noted at 24 Cal.3d 274) a loss of $325,000, or the reduction in value of property to less than 20% of its former value. This is devastation, wipeout, catastrophy. To characterize it as "mere" is semantic surrealism approaching Orwellian newspeak. One might similarly speak of "mere mass murder" or "mere Holocaust". Federal courts sitting in California do not always escape this semantic trap, either; see the startling justification of an uncompensated reduction in value of property from $2,000,000.00 to $100,000.00 under the same rubric in *Haas v. City and County of San Francisco* (9th Cir. 1979), 605 F.2d 1117.

[citizen] of substantially all" of his right to speak freely. It is enough if there are still one or two subjects on which an unfettered utterance can be made. Of similar consequence would be a ruling that the freedom of religion is preserved unless the effect of the governmental inhibition is "to deprive the [communicant] of substantially all" of his faith and practice, i.e., a directive that would limit his worship to a quarterly expression within the confines of three ecclestical systems upon which the state has impressed its imprimatur would be upheld.

In *Truax v. Raich* (1915), 239 U.S. 33, this court passed upon a constitutional challenge to an Arizona statute prohibiting Arizona employers of more than five workers from maintaining a work force that was not "eighty (80) percent qualified electors or native-born citizens of the United States." 239 U.S. at 35. The court addressed the argument that since an employer could employ 20 percent aliens, i.e., in paraphrase of the *Agins* language, since the ordinance did not deprive the employer of substantially all of his right to employ aliens (or, more realistically, deprive aliens of substantially all of their right to find reasonable employment), the statute was not constitutionally infirm. The "fallacy" in this argument, wrote Justice Hughes, was that once the principle was admitted that the state could control the percentage of aliens employed there would be no limit on the state's power of exclusion. If 20 percent could be justified, so could 10 percent or 5 percent. The statute was struck down.

As did Arizona in *Truax v. Raich*, California in *Agins v. Tiburon* attempted to maintain the semblance of a constitutional protection, while at the same time so shrinking

its sphere of operation as to effect a *de facto* repeal. In Japanese *bonsai* cultivation, in which dwarf trees often live hundreds of years, miniaturization may aid preservation. In contrast, miniaturization of constitutional rights is antithetical to preservation. As the legislation in *Truax* amounted to "discrimination . . . against aliens as such in competition with citizens", so the standard of validity in *Agins* amounts to discrimination against holders of interests in property as such in relation to governmental bodies and benefiting citizens.

The justification offered by the California Supreme Court for its sweeping deference to regulators in *Agins v. City of Tiburon*, to encourage "strict" and "innovative planning measures", rather than more cautious and traditional ones (24 Cal.3d at 276), is similarly vulnerable. It is true that limiting the rights of property owners *would* make the whole process much more efficient. Democracy, as noted in the statement most often attributed to Harry Truman, is a particularly inefficient form of government. By the same token, if our criminal laws were modified to greatly diminish the rights of accused in criminal cases by substituting policeman hunches for the present standard of probable cause, doubling the length of all sentences, abolishing probation and parole, requiring a bare majority of a jury for a conviction, and substituting a much more relaxed standard for "beyond a reasonable doubt", we would have a "strict" and "innovative" program that would clearly be much more efficient in terms of reducing the incidence of crime, and getting the malefactors off the streets. The point is, however, that the social cost of these repressive changes is too great. Our system is grounded

on complex interweaving of checks and balances, and there is no reason why land regulators should be excepted therefrom. A little inhibition here can be a very healthy thing.

C. Reasonable Restrictions.

Amici do not contend that the right to just compensation is without limitation, any more than any other constitutional right is absolute. This court recently held again that the right to freedom of speech sometimes must yield to imperatives of national security. *Brown v. Glines* (1980), ... U.S. ..... [U.S. Law Week 4095] and *Secretary of Navy v. Hatt* (1980), ... U.S. ..... [U.S. Law Week 4122]. Freedom of religion approaches the absolute in what one may believe, but practice of such beliefs is sometimes sharply curtailed. *Reynolds v. Utah* (1878), 98 U.S. 145. See also the concurrence of Chief Justice Burger in *Police Dept. of Chicago v. Mosley* (1972), 408 U.S. 92, 102-103.

Liberal enforcement of the just compensation guarantee would not threaten life, or the moral order. Arguments against such enforcement, however highminded they might seem in initial statement, always seem on close scrutiny to reduce themselves to reluctance to fund. These are not persuasive. See Point III. B., *supra*.

D. Public Use.

A concept closely related to the idea that oppressive regulation cannot trigger a compensation has further increased the California property owners' already heavy task. This concept is that, in the absence of formal appropriation or physical invasion, the imposition of controls and restrictions (however harsh) upon private land for

public benefit does not constitute a "public use" of that land in a constitutional sense. This is implicit in *Agins v. City of Tiburon,* and is explicit in some recent decisions, such as *Friedman v. City of Fairfax* (1978), 81 Cal.App. 3d 667, 677, 146 Cal.Rptr. 687.

This is totally at odds with the expansive California concept of public use, which found expression in direct condemnation cases (notably *Gilmore v. Lime Point* (1861), 18 Cal. 229, and *Bauer v. Ventura* (1955), 45 Cal.2d 276, 284, 289 P.2d 1) which embody the ascendant public advantage (as distinguished from "public employment") standard.[38] Whether *Friedman* and other new cases will modify the traditional direct condemnation standard expressed in *Gilmore*, or whether there will now exist, simultaneously, two lines of cases—a line with a broad test for entities to rely on when direct condemnation is instituted, and a second line with a much more restricted definition of public use for use by the same entities when they are sued—remains to be seen.

A post-*Agins* case incorporating the narrow and regressive *Friedman* test, *Briggs v. State ex rel. Dept. of Parks and Recreation* (1979), 98 Cal.App.3d 190, 203, ... Cal. Rptr. ....., offers a full smorgasbord of rules and precepts limiting rights of property owners which are enjoying increasing presence in California cases. In that case, the Court of Appeal totally ignored strong trial court factual findings in favor of the owner, and held (among other

[38]See 2A Nichols, Eminent Domain, § 7.2 (rev. 3d ed. 1970); Condemnation Practice in California, § 6.4 (California Continuing Education of the Bar, 1973).

things) that she waived valuable rights by failing to assert them two years before they accrued.

It also repudiates the position that California courts (like courts of virtually all American jurisdictions) have heretofore embraced, that just compensation questions must be viewed from the vantage of the property owner. The inquiry of reviewing courts must center on what the owner has *lost*, not what the acquiring or regulating entity has *gained*.[39] This Court has repeatedly espoused this principle.[40]

The idea that the constitutional right to just compensation should depend upon "such formalities" as "formal appropriation or physical invasion" has been branded by Professor Joseph Sax as "preposterous".[41]

According to Professor Arvo Van Alstyne, the idea that the question of whether a physical invasion occurred has relevance to liability has "long since been relegated to the rank of an academic curiosity."[42] Nichols notes that the concept has been "uniformly rejected".[43] California first

[39]See, e.g., *People v. Lynbar, Inc.* (1967), 253 Cal.App.2d 870, 62 Cal.Rptr. 320.

[40]In, *inter alia, United States v. Causby* (1946), 328 U.S. 256, 261; *United States v. Miller* (1942), 317 U.S. 369.

[41]Sax, *Takings and Police Power*; 74 Yale Law Journal, 36, 47 (1964).

[42]Van Alstyne, *Taking and Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L.Rev. 1, 7 (1970).

[43]2A Nichols, *The Law of Eminent Domain* (Rev. Ed. 1975), § 6.441.

rejected it as least as early as 1913.[44] And yet, in the year of our Lord nineteen hundred and eighty, this creaking anachronism has been dredged from the refuse heap of justly discarded legal shibboleths, given a new if ill-fitting suit of clothes, and brought forth as if it were the end product of an enlightened evolution.[45]

E. A Proposed Approach.

1. Overview.

The realization that *Agins* retention-of-de-minimus-use standard is not adequate does not resolve the problem of ascertaining the correct standard. The difference between substantial impairment and noncompensable regulation cannot be reduced to precise fractional value reductions. It depends upon a series of factors. This section will address some of these factors, and suggest a two-step analysis of particular situations which should add clarity and reduce injustice, by severing the evaluation of the threshold power to regulate from the consideration of the economic consequences of such regulation.

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[44]*Pacific Telephone Co. v. Eshelman*, 166 Cal. 640, 137 P. 1119. See also, *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. 104, fn. 25; *San Antonio River Authority v. Garrett Brothers*, *supra*, 528 S.W.2d at 273; *Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, *supra*, 80 Harv. L.Rev. at 1186-1187.

[45]In this context, it is not signficant that California and 23 other states provide protection against damages as well as taking in the just compensation clauses in their constitutions (Cal. Const. Art. 1 § 19 is reproduced as Appendix A, *infra*). The federal provision has been construed sufficiently expansively by this court to provide virtually parallel protection. See, e.g., *U.S. v. Kansas City Insurance Co.* (1950), 339 U.S. 799.

2. Relevant Factors.

The single most important consideration remains diminution of value (or, if preferred, limitation of use, which is synonymous), seen both in terms of percentage reduction and absolute dollars. Also significant is the question of whether the consequences of a particularly regulatory imposition are isolated on a few individuals or spread throughout a larger community (thus intrinsically meeting the objective of the just compensation clause). A related inquiry is whether the complainant's property is treated differently from contiguous properties, or comparable properties in the area.

Very pertinent is the reasonable investment-backed economic expectation of the regulatee. In determining reasonableness, representations and promises made by entity officials or employees should be given full weight, whether or not the entity is technically liable therefor under the law of *respondeat superior*.

Another factor often discussed is acquisitive intent. Regulation is often employed as a softening device prior to actual acquisition.[46] If such intent is manifest, it should be considered. But if the absence of documented evidence of acquisitive intent is excessively emphasized, budget-conscious agencies may be unduly tempted to use regulation as a substitute for acquisition.

Even more troublesome is the periodic attempt by courts to balance private loss against collective gain. Michelman rejects this as "a mistake, at best reflecting a careless con-

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[46]See Kanner, Condemnation Blight: Just How Just is Just Compensation? 48 Notre Dame Lawyer 765 (1973).

fusion of two quite distinct questions."[47] A regulation is "valid" or "invalid" depending upon whether its objective is proper and whether the restrictions and controls it imposes are reasonably related to that objective. The just compensation clause is violated if a regulation requires an individual to bear more than his fair share of the total economic burden thereby generated.[48]

An affirmation that could emerge from this case that would be very helpful is that zoning or regulating property into open space is a full taking for which compensation must be paid. This is true whether the open space is *de jure* or *de facto,* i.e.:

(1) where the regulation has the effect of preventing development, but preserves a nominal *de minimus* use in the owner so that a euphemism can be used for "open space"; or

(2) where (as is here pleaded, because of the costs of on-site and off-site improvements) the permitted use is so uneconomical to be effectively prohibited.

3. Suggested Two-Step Analysis.

The first step of this proposed approach focuses upon threshold questions such as (1) the fundamental power of the body to regulate in the area it purports to act, (2)

[47] Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, supra,* 80 Harv. L.Rev. at 1194. See also 1 Nichols, *The Law of Eminent Domain* (rev. 3d ed. 1974) § 1.11.

[48] Balancing makes sense only when the *special* and *particular* benefits received by the property owner, as distinguished from the *general* benefits the regulation or act bestows upon the community, are balanced against his loss. The idea that the more valuable the object a citizen is coerced into surrendering to society, the less right he has to compensation, is a logical aberration.

statutory and constitutional standards (except for just compensation), (3) procedural regularity (notice, hearing, conformance to time requirements), and (4) questions which are basically political (necessity, location, aesthetic particulars, etc.). In reviewing these political aspects, courts appropriately confess reluctance to substitute their judgment for that of the political body.

If the challenged regulation clears this first phase, step two poses a solitary question: Has the regulation violated the just compensation clause? Since it is exclusive province of the judiciary to determine whether compensation is required, no deference whatsoever need be given to any utterances of intention which may have been tendered by the entity or any representative thereof. The impact, not the intent, controls. As Justice Stewart noted in concurrence in *Hughes v. Washington* (1967), 389 U.S. 290:

> "As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." 389 U.S. at 298; emphasis in original.[49]

If violation of the just compensation clause is found, an appropriate remedy should be fashioned. It would be a mistake to assume that an entity would invariably opt for invalidation. Sometimes the goal behind a regulation might

[49] From *Davis v. George B. Newton Coal Co.* (1925), *supra,* 267 U.S. at 301: "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."

be deemed of such significance, or a regulatory scheme might represent such an investment of time and energy, that the entity would choose payment of fair compensation to abandonment. The complex scheme involved in the *Rail Reorganization Cases* (1974), 419 U.S. 102, illustrates the type of regulatory program that would not be casually abandoned. Flexibility in remedy is here the *sine qua non.*

V

BY AN OVERWHELMING MAJORITY, LEGAL SCHOLARS OF THE FIRST TIER FAVOR COMPENSABLE REGULATION.

A. Specific Secondary Authorities Cited In Agins.

1. Literature Extensive.

In *H.F.H., Ltd. v. Superior Court, supra,* the California Supreme Court made reference to the "voluminous secondary literature on the taking issue". 15 C.3d at 520. The acknowledgment of the existence of this literature (and it is indeed rich and voluminous) raises inquiry as to the reason for the curiously skimpy citations to it in *Agins v. Tiburon.* Even a brief perusal of this literature is sufficient to clear up this mystery, however. The thrust of this literature, and especially its most respected treatises, is patently inconsistent with the resolution the majority reached.

The majority cited five secondary authorities. Two can be disposed of summarily.

2. Standard Treatise Wrongly Cited.

The court's quotation from the standard condemnation text[50] at 24 C.3d 272, to buttress its conclusion the oppresive regulation cannot create an action in damages is seriously misleading. This section speaks only to what constitutes and what does not constitute a valid exercise of governmental power, and does *not* concern itself with remedies. Elsewhere in his treatise, Nichols states:

> "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constituutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." 2 *Nichols on Eminent Domain* [3d rev.ed. 1975] (§ 6.13 at p. 6-65.)

When both quotes are read in context, it is clear that *Nichols* does *not* support the majority opinion.

3. Remaining Citations.

The most prestigious treatise mentioned in the opinion, Professor Ellickson's *Suburban Growth Controlling An Economic and Legal Analysis,* 86 Yale L.J. 385 (1977) is cited only for its "contrary analysis". 24 Cal.3d at 266.

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[50]The quoted language: "Not only is an actual physical appropriation under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation." 1 Nichols, *Eminent Domain* (3d rev.ed. 1975) § 1.42(1), pp. 116-121.

That leaves only three supporting authorities. Two of these are student notes[51] and the third is an outspoken attack on the principle of private property by an Associate Professor of Environmental Studies at the University of California at Santa Cruz.[52]

It is not the intention of the brief to denigrate student comment. In this field as well as others, it has made significant contribution through the years. It is true, however, that much of the literature advocating limited compensation or no compensation is student comment.[53] As will be more particularly demonstrated hereinafter, scholars of the highest reputation, who have worked and written in this field for years, are virtuaully in total accord in their urging for the availability of monetary relief in harsh regulation situations.

B. Michelman.

Professor Frank I. Michelman's incisive monograph *Property, Utility and Fairness: Comment on the Ethical Foundations of "Just Compensation" Law*, 80 Harvard L. Rev. 1165 (1967) has grown in reputation through the

[51]Fulham and Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance* (1974), 26 Stan. L. Rev. 1439, 1450-1451, and Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 Hastings L.J. 1569 (1977).

[52]Bowden, *Legal Battles on the California Coast: A Review of the Rules*, 2 Coastal Zone Management Journal 273 (1974). Professor Bowden is a graduate of Boalt Hall School of Law at the University of California (Berkeley).

[53]Not all student notes take such a rigid pro-regulator position. See, for example, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal For Reform*, 33 Albany L.Rev. 537 (1969), and *Compensable Regulations: Outline of a New Land Use Planning Tool*, 10 Willamette L.I. 451 (1974).

years, and is probably the most influential article on the just compensation clause. This court cited it repeatedly in *Penn Central Transportation Co. v. City of New York, supra.*

While the Michelman treatise, like the Bible, offers something for all points of view, its basic alignment is on the side of fairness in just compensation deliberations, "and that its most important immediate implication for public policy pertains to the assignment of responsibility for ensuring that compensation is paid whenever it ought to be." Michelman, *op.cit. supra* at 1172.

In this articulation of his central premise, Professor Michelman stressed the compelling need for:

> " . . . resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain 'unsocialized' exceed their benefits. Thus it would appear that *any measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.*" Michelman, *op.cit. supra* at 1181; emphasis added.

One point suggested in this paragraph, and developed more fully in the remainder of the article, is that the consequences flowing from the use or denial of compensation as a tool in land regulation law are far more subtle than initial analysis might suggest. Failure of fair cost distribution will often bring in its wake social, economic and

political consequence of real magnitude quite apart from the initial adverse impact on the owner of the impaired interest.[54] The court's attention is especially invited to this consideration, which pervades the treatise.

In his analysis, Michelman relied heavily on the widely respected *A Theory of Justice* by John Rawls (Harvard, 1971).[55] Professor Rawls repudiates the utilitarian greatest-good-for-greater-number philosophy and eloquently advocates a sensitive approach to justice, cognizant of both majority needs and minority rights:

> "It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have inviolability founded on justice, or, as some say, a natural right, which even the welfare of everyone else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore, in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interest." Rawls, *op.cit. supra*, pp. 27-28.

[54]An example of this kind of indirect cost is evident in the present case. Tiburon restricts development to maintain an open ridge. This decreases housing available in that city and, through a spill-over ripple effect, in surrounding communities. The cost of housing rises sharply. The positive correlation between the pro-open space and anti-growth policies of many Bay Area communities, and the high and accelerating cost of housing in this area, is so apparent as to require no supporting authority.

[55]This volume collects earlier articles. See Michelman, *op cit.*, p. 1219 for original citations.

The California Supreme Court in *H.F.H. Ltd. v. Superior Court, supra*, quoted language from the Michelman treatise likening land purchase to a sweepstakes ticket. 15 Cal.3d at 521. The point made was that a prospective purchaser of real property interest should know that realty might thereafter be subject to restrictions. If it is so subjected, he simply took a risk and lost, and need not be compensated. This quotation and the analysis it supported are misleading for several reasons: *First*, the sweepstakes analogy is inapposite. Land regulation is *not* like a sweepstakes. The basis of a sweepstakes is random chance, producing fortune or misfortune. In land regulation, misfortune is deliberately and intentionally inflicted as an act of individual or collective will. The only thing randomized is the burden. *Second*, the analysis of the California Supreme Court could apply equally well to someone buying property while knowing that it might someday be taken for a school or a hospital. Under that analysis, the purchaser similarly took a risk and lost, and therefore, should receive no compensation. *Finally*, the quotation is shorn of its context. The result in *H.F.H. Ltd. v. Superior Court*, like the result in *Agins*, is simply incompatible with the pro-compensation thrust of Professor Michelman's article.

C. Van Alstyne.

A scholar and lecturer of comparable rank with Professor Michelman is Arvo Van Alstyne, former Professor of Law at U.C.L.A. and presently Professor of Law and As-

sistant to the President at the University of Utah. Professor Van Alstyne's work[56] is particularly germane to this case, since it centers on California experience.

Like Michelman, Van Alstyne favors fair distribution of burdens generated by land use controls through compensable regulation. During the pendency of *H.F.H. Ltd. v. Superior Court, supra,* before the California Supreme Court, Professor Van Alstyne wrote a letter (dated December 24, 1974) to the writer of this brief expressing his view of the issues raised. From that letter, which (with his permission) was made part of an *amicus curiae* brief:

> "It has long been my opinion, based upon a comprehensive study of cases dealing with inverse condemnation, that ultimate judgments on compensability should not be predicated upon the classification of the particular power as being 'police power' or 'eminent domain' but rather should be predicated upon a more sophisticated attempt to identify factors relevant to the issue of compensability . . .
>
> "Thus, what I am suggesting is that the law should be moving in the direction of a careful evaluation of the effect of the governmental power upon private rights to determine the question of compensability.

[56]An imposing body, including, *inter alia, Statutory Modifications of Inverse Condemnation: The Scope of Legislative Power,* 19 Stanford L.R. 727 (1967); *Modernizing Inverse Condemnation: A Legislative Prospectus,* 8 Santa Clara Lawyer 1 (1967); *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction,* 20 Stanford L.R. 617 (1968); *Inverse Condemnation: Unintended Physical Damage,* 20 Hastings L.J. 431 (1969); *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California,* 16 U.C.L.A. L.Rev. 491 (1969); *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 So.Cal. L.R. 1 (1971), and the practice book *California Government Tort Liability* (California Continuing Education of the Bar 1964) with supplements.

> This effect could well be judged by giving consideration to such matters as the substantiality of the detriment or interference sustained by the affected private person, the extent to which the regulation forces the affected individual to contribute benefits for the public welfare rather than to terminate externalized harms which he is inflicting upon the public, the extent to which the affected person is being required to assume more than a fair share of the cost of public improvements, and the extent to which the action taken frustrates reasonable investment-backed expectations with respect to the relationships between government programs and activities and private property interests."[57]

D. Other Scholars.

In an extended brief in support of the property owners in *H.F.H., Ltd. v. Superior Court,* Professors Gideon Kanner of Loyola of Los Angeles School of Law and Donald G. Hagman of U.C.L.A. College of Law[58] (themselves both in

[57]There is more recent evidence of the conceptual abyss between Van Alstyne and the California courts. A Court of Appeal in *Briggs v. State of California, supra,* cited a Van Alstyne article (*Inverse Condemnation: Unintended Physical Damage, supra*) for the proposition that the substantial contributing clause rule is limited to physical damage situations. (98 C.A.3d at 204). The authority cited does not support this position, which is in fact diametrically opposed to the author's utterances in point. This abuse brought a pointed and prompt letter from Professor Van Alstyne to counsel for one of the parties, wherein it was stated with vigor and indignation that the court had "totally misconstrued my views". This letter was brought to the attention of the Court of Appeal during the Petition for Rehearing process. It prompted only a modest, non-substantive modification of the particular reference. The opinion as modified *still* imputes a view to Professor Van Alstyne inconsistent with that consistently expressed in his letter and pertinent writings.

[58]Professor Kanner is the author of numerous articles in the land use regulation field, such as *The Consequences of Taking Property by Regulation,* 24 Practical Lawyer 65 (1975). He is Chairman of the Condemnation Committee of the American Bar Association and

(footnote continued next page)

the forefront of legal scholars favoring compensable regulation as a tool to distributive justice in land use cases) surveyed the secondary literature in point. They found among scholars of the first tier (in addition to themselves and the Douglas Commission)[59] twenty-three favoring (albeit with varying degrees of enthusiasm and widely divergent ideas as to the mechanics of implementation) compensable regulation, against a single dissenter. The ayes included Richard Babcock,[60] Leland Badler,[61] John Banta,[62] Lawrence Berger,[63] Fred Bosselman,[64] John T. Cabaniss,[65] David Callies,[66] Donald M. Carmichael,[67] John

served as an adviser to the Committee which drafted the Uniform Eminent Domain Code. He is also the publisher of *Just Compensation*, the national monthly service in condemnation law, and the founding president of the California Academy of Appellate Lawyers. He is an attorney of record for appellants in the instant case.

Professor Hagman is the author of a wide variety of monographs and books, including *California Zoning Practice* (California Continuing Education of the Bar 1969, Supp. 1978) and (with Dean Misczynski) *Windfalls for Wipeouts: Land Value Capture and Compensation* (American Society of Planning Officials, 1978).

[59]This commission, dominated by laymen, issued a major report in 1968 entitled *The National Commission on Urban Problems, Building the American City*, favoring compensation.

[60]Babcock, *New Directions in Connecticut Planning Legislation*, 50 (American Society of Planning Officials 1967).

[61]Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 Urban Lawyer 25 (1973).

[62]See Footnote 64, *infra*.

[63]Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L.Rev. 165 (1974).

[64]Bosselman, *The Third Alternative in Zoning Legislation*, 17 Zoning Digest 73 (1965). Mr. Bosselman is co-author (with Banta and Callies) of *The Taking Issue* (Council of Environmental Quality 1973). This triumverate favors a more limited use of compensation and greater deference to government than most of the remaining scholars on this list.

[65]Cabaniss, *Inverse Condemnation in Texas, Exploring the Serbonian Bog*, 44 Texas L.Rev. 1584.

[66]See Footnote 64, *supra*.

[67]Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 Fla. St. U. L.Rev. 35 (1974).

J. Costonis,[68] J. Delafons,[69] Allison Dunham,[70] Robert C. Ellickson,[71] T. J. Kent,[72] Jan Z. Krasnowiecki,[73] Daniel R. Mandelker,[74] Frank I. Michelman, James C. N. Paul,[75] Jerome G. Rose,[76] Joseph L. Sax,[77] Paul Schmid,[78] Ann Louise Strong,[79] Arvo Van Alstyne, and Graham Waite.[80] The sole absolute nay was Jacob Henry Beuscher.[81]

[68]Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harvard L.Rev. 574 (1972). Professor Costonis has emerged as a prolific writer of growing reputation, whose many treatises are increasingly cited.

[69]Delafons, an English scholar of high repute, authored *Land Use Controls in the United States* (2d ed. 1969).

[70]Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y. U. L.Rev. 1238 (1960).

[71]Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U.Chi. L.Rev. 681 (1973).

[72]Kent, *Open Space for the San Francisco Bay Area: Organizing to Guide Metropolitan Growth*, Berkeley Institute of Governmental Studies (1970).

[73]Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L.Rev. 179 (1961); Krasnowiecki and Strong, *Compensable Regulations: A Means for Controlling Growth Through The Retention of Open Space*, 29 J.Am. Inst. Pllers .... (1963).

[74]Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wisconsin L.Rev. 3.

[75]See Footnote 73, *supra*.

[76]Rose, *A Proposal For Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 Real Estate L.J. 635 (1974).

[77]Sax, *Takings Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

[78]Schmid, *The Role of Grants, Exchange and Property Rights in Environmental Policy, Transfers in an Urbanized Economy*, 340 (K. Boulding, M. Pfaff & A. Pfaff, ed. 1973); *Tax Policy and Land Use Guidance Techniques, Land-Use Policies* 19 (1970). Professor Schmid is a leading economist.

[79]See Footnote 73, *supra*.

[80]Waite, *Governmental Power and Private Property*, 16 Cath. U. L.Rev. 283 (1967).

[81]Beuscher, *Land Use Controls: Cases and Materials* (3d ed. 1964).

The few years that have transpired have not notably shifted opinion among the most reputable scholars.[82]

CONCLUSION

We do not believe that the imperatives of a rational land use program mandate the emasculation of the Bill of Rights.

We do not believe that the quantum of protection afforded by the Bill of Rights to citizens should vary dramatically from jurisdiction to jurisdiction.

We do not believe that the concept that the party enjoying the benefit shall bear the burden, which has quickened Anglo-American jurisprudence since that system took a visible form, should now be discarded.

We do not believe that a public entity should be able to internally determine whether the community as a whole, on the one hand, or a single individual or a few individuals, on the other hand, is to assume the cost of a public improvement, and to implement this determination by the simple expedient of labeling its acquisitive act.

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[82]Post-1974 monographs of special interest, favoring compensation, are the Ellickson article cited on page 53, *supra*, and M. Berger, *To Regulate or Not to Regulate: Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protections and Private Property Rights*, 8 Loyola of L.A. L.Rev. 253 (1975). A thoughtful article by a practicing attorney published just prior to 1974 is Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Governmental Action*, 25 U. Fla. L.Rev. 635 (1973).

For all the reasons set forth herein, we urge that the decision of the Supreme Court of California be reversed and the rights of citizens to vigorous protection of their constitutional rights be reaffirmed.

Dated, San Francisco, California, February 20, 1980.

Respectfully submitted,

GOLDSTEIN, BARCELOUX
& GOLDSTEIN
FADEM, BERGER & NORTON
JESS S. JACKSON, JR.
THORPE, SULLIVAN, WORKMAN,
THORPE & O'SULLIVAN
DESMOND, MILLER, DESMOND
& BARTHOLOMEW
MATTEONI & SAXE
ADAMS, LEVIN, KEHOE, BOSSO
SACHS & BATES
JOSEPH GUGHEMETTI
BRESSANI, HANSEN & BLOS
OGLE, GALLO & MERZON
THOMAS G. BAGGOT, JR.
WILLIAM CHIDLAW
MALAVOS & CHASUK
FITZGERALD & EDGAR
ATHERTON & DUNN

By M. REED HUNTER

(Appendices Follow)

Appendices

APPENDIX A

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of California, Article 1, Section 19

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the

condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

APPENDIX B

Burton J. Goldstein
M. Reed Hunter
Goldstein, Barceloux & Goldstein

Mr. Goldstein has been active in the trial and appellate courts in condemnation and land use cases since 1938. A frequent author and lecturer, he authored the chapter on inverse condemnation in *Condemnation Practice in California* (California Continuing Education of the Bar, 1973). He is presently the Chairman of the American Bar Association Committee on Condemnation, Land Use and Zoning of the Section of Litigation for the State of California. Mr. Hunter has been active in this field in California since 1968 (after earlier practice in Utah). He edited *Condemnation Practice in California* (California Continuing Education of the Bar, 1973), has served on the California State Bar Condemnation Committee, and is the President of the California Academy of Appellate Lawyers. Like many of the attorneys hereinafter listed, Mr. Goldstein and Mr. Hunter are members of the Bar of this Court.

Gerald A. Fadem
Michael M. Berger
Fadem, Berger & Norton

Gerald A. Fadem has concentrated his trial practice in condemnation and land use regulation law since 1953, and has tried more than 200 eminent domain cases. He served as counsel for property owners in *Nestle v. City of Santa Monica* (1972), 8 Cal.3d 920, 101 Cal. Rptr. 568, 496 P.2d 480, and *People v. Lynbar, Inc.* (1967), 253 Cal.App.2d 870, 62 Cal.Rptr. 320. He has frequently lectured in his area of

expertise, and is the author of a number of articles. He was chairman of the California State Bar Condemnation Committee for the year 1977-1978. Mr. Berger is Vice President of the California Academy of Appellate Lawyers and has written frequently in this field. Representative articles (in addition to those cited in the text of this brief) are *Nobody Loves An Airport*, 43 So. Calif. L.Rev. 631 (1970), and *A Noisy Airport Is A Damned Nuisance*, 3 Southwestern U.L. Rev. 39 (1971; co-authored with Mr. Fadem).

Jess S. Jackson, Jr.

Mr. Jackson has been in practice for 25 years, and was counsel for property owners in *Drakes Bay Land Co. v. The United States* (Ct. Clms. 1970-72), 424 F.2d 574, 459 F.2d 504, and *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency* (9th Cir. 1977), 561 F.2d 1327). He has participated in numerous continuing education courses. He was Chairman of the California State Bar Condemnation Committee for the year 1976-1977, and is a former President of the California Coastal Council.

Roger M. Sullivan
Henry K. Workman
John J. Dee
Thorpe, Sullivan, Workman,
Thorpe & O'Sullivan

Mr. Sullivan has been practicing land use and condemnation law since 1952. Mr. Workman, who presently concentrates on the appellate phase of this practice, has practiced law since 1950, while Mr. Dee has been similarly active for about a decade. Mr. Sullivan was Chairman of the California State Bar Condemnation Committee for the year 1975-1976. He also served as Chairman of the Con-

demnation Law Committee of the Real Property Section of the American Bar Association and as an adviser to the Uniform Law Commissioners of the American Bar Association who drafted the model Eminent Domain Code. He was counsel for property owners in *United States v. Eden Memorial Park* (9th Cir. 1965), 350 F.2d 933. Mr. Dee has served on the California State Bar Condemnation Committee, and both he and Mr. Workman have been members of the Los Angeles County Bar Condemnation Committee. This firm was also counsel for property owners in *Southern California Edison Co. v. Bourgerie* (1973), 9 Cal.3d 169, 107 Cal.Rptr. 76, 507 P.2d 964, and *City of Santa Barbara v. Petras* (1971), 21 Cal.App.3d 506, 98 Cal.Rptr. 635.

Richard F. Desmond
Stephen J. Wagner
Desmond, Miller, Desmond & Bartholomew

Richard F. Desmond has been a trial and appellate lawyer in land use and condemnation since 1951. He was the Chapter President of the Lawyers Club of Sacramento, and served as Chairman of the State Bar Condemnation Committee during the year 1978-1979. Stephen J. Wagner has been practicing in the same field since 1975. This firm was counsel for the property owners in, *inter alia, Jones v. People* (1978), 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165, and *Parking Authority of the City of Sacramento v. Nicovich* (1973), 32 Cal.App.3d 420, 108 Cal.Rptr. 137. These attorneys have appeared repeatedly through the years before various committees of the California legislature.

Norman E. Matteoni
Matteoni & Saxe

Mr. Matteoni has been practicing law since 1964. For many years he was a member of the staff for the County Attorney for Santa Clara County and handled major condemnation and land use cases for that office. A prolific author, Mr. Matteoni has contributed extensively to publications of California Continuing Education of the Bar (including the 1973 Practice Book), and authored two articles in the January, 1969, issue of the *Hastings Law Journal*, a special land use issue. He presently serves on the California State Bar Condemnation Committee.

Dennis J. Kehoe
Adams, Levin, Kehoe, Bosso,
Sachs & Bates

Mr. Kehoe's firm has a large land use practice in the South Bay. Mr. Kehoe formerly was in the County Attorney's Office and, during that period, was counsel for County officials in the leading case of *Pratt v. Adams* (1964), 229 Cal.App.2d 602, 40 Cal.Rptr. 505.

Joseph Ghughemetti

Mr. Ghughemetti, a young trial lawyer specializing in land use and condemnation cases, has been active in the political as well as the legal sphere. He has drafted proposed legislation and testified before Congressional and state legislative hearings. He is president of the California Coastal Council.

Gerald B. Hansen
Bressani, Hansen & Blos

Mr. Hansen has been active in condemnation and inverse condemnation law in the rapidly growing San Jose area

since he commenced practice almost 30 years ago. He has tried about 50 land use cases to verdict. He has served as a member of the California State Bar Condemnation Committee.

Charles E. Ogle
Ogle, Gallo & Merzon

Mr. Ogle's firm has a large practice in land use law in the central-coast area of California. He has been practicing for 28 years. Among the cases in which he was counsel of record is *People v. Bailey,* a companion case to *Merced Irrigation District v. Woolstenhulme* (1971), 4 Cal.3d 478, 93 Cal.Rptr. 833, 483 P.2d 1.

Thomas G. Baggot, Jr.

Mr. Baggot has represented public entities and property owners since 1948. He is presently Chairman of the California State Bar Condemnation Committee, and was earlier Chairman of the Los Angeles County Bar Condemnation Committee. He contributed to both the 1962 and 1973 practice books published by California Continuing Education of the Bar. He was counsel for the property owners in the landmark case of *Klopping v. Whittier* (1972), 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345.

William Chidlaw

In his 27 years as an active attorney, Mr. Chidlaw has developed an extensive and diversified practice. Condemnation and land use is one of his areas of special expertise. He is presently Vice-Chairman of the California State Bar Condemnation Committee.

Alfred P. Chasuk
Malovos & Chasuk

Active in this field since 1951, Mr. Chasuk concentrates on trial practice. He was counsel for property owners in *People ex rel. Dept of Public Works v. Kawamoto* (1964), 320 Cal.App.2d 18, 40 Cal.Rptr. 685.

William R. Edgar
Fitzgerald & Edgar

Mr. Edgar has been specializing in this field of law since admission to the Bar in 1959. In his early years of practice, he concentrated on representing public entities; *People ex rel. Dept. of Public Works* (1968), 68 Cal.2d 206, 65 Cal. Rptr. 342, 436 P.2d 342, dates from that period. A more recent case is *Golden Gate Bridge District v. Muzzi* (1978), 83 C.A.3d 707, 148 Cal.Rptr. 197. Mr. Edgar has served as a member of the California State Bar Condemnation Committee and is the author of *Leasehold Valuation Problems and Eminent Domain,* 4 San Francisco L.Rev. (1969).

Michael A. Atherton
Atherton & Dunn

Mr. Atherton, admitted to practice in California in 1957, is a trial lawyer. He was formerly City Attorney for the City of Mountain View, and has been active in various Bar committees dealing with land use regulation.